Dataran Rentas Sdn Bhd v BMC Construction Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–9 OF 2007(P)
RICHARD MALANJUM CJ (SABAH AND SARAWAK), NIK HASHIM AND HASHIM YUSOFF FCJJ
29 JANUARY 2009

Civil Procedure — Appeal — Appeal to Federal Court — Framing of questions — Whether questions posed related to matters decided by Court of Appeal — Whether fell within ambit of s 96(a) of the Courts of Judicature Act 1964

By a letter of award dated 29 July 1997 the appellant awarded a building contract to the respondent. The appellant failed to pay upon certain interim certificates within the time stated and as a result, the respondents filed a winding-up petition in the High Court against the appellant. The appellant was accordingly wound up. The Court of Appeal dismissed the appeal against that decision. The Federal Court allowed the appellant's application for leave to appeal based on the following questions: (i) whether the building contract entered into between the parties was illegal; and (ii) whether the respondent was entitled to present a winding up petition on the basis of the architect certificates issued in respect of the building contract.

Held, dismissing the appeal with costs:

(1) To come within the ambit of s 96(a) of the Courts of Judicature Act 1964 ('the Act'), the applicant must, apart from showing that the judgment of the Court of Appeal is in respect of any civil matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage, frame the question in such a manner as to incorporate a point of law the answer to which has the effect of reversing the judgment of the Court of Appeal. The questions posed must relate to a matter in respect of which a determination has been made by the High Court and the Court of Appeal (see para 6).

(2) The Federal Court was asked to answer an issue which was not determined by the High Court as well as the Court of Appeal. The issue was on the legality of the contract. The issue of legality of contract was abandoned in the High Court at submission stage and was not even stated in the appellant's memorandum of appeal at the Court of Appeal.

Therefore, the Federal Court could not reopen and reconsider the issue. The questions posed were not properly framed under s 96(a) of the Act (see paras 11–12).

[Bahasa Malaysia summary

Melalui sepucuk surat award bertarikh 29 Julai 1997 perayu telah mengawardkan satu kontrak pembinaan kepada responden. Perayu gagal membayar beberapa sijil interim dalam tempoh yang telah ditetapkan dan akibatnya, responden telah memfailkan petisyen penggulungan di Mahkamah Tinggi terhadap perayu. Perayu kemudiannya telah digulung. Mahkamah Rayuan menolak rayuan terhadap keputusan tersebut. Mahkamah Persekutuan membenarkan permohonan perayu untuk kebenaran merayu berdasarkan persoalan-persoalan berikut: (i) sama ada kontrak pembinaan yang dimasuki pihak-pihak tersebut tidak sah; dan (ii) sama ada responden berhak mengemukakan satu petisyen penggulungan berdasarkan sijil-sijil arkitek yang dikeluarkan berkaitan dengan kontrak pembinaan tersebut.

Diputuskan, menolak rayuan dengan kos:

(1) Untuk dimasukkan dalam lingkungan s 96(a) Akta Mahkamah Kehakiman 1964 ('Akta tersebut'), pemohon hendaklah, selain daripada menunjukkan bahawa keputusan oleh Mahkamah Rayuan berkaitan dengan mana-mana perkara sivil yang diputuskan Mahkamah Tinggi dalam melaksanakan bidang kuasa asalnya melibatkan persoalan rukun am yang diputuskan buat pertama kali atau persoalan kepentingan di mana hujah selanjutnya dan keputusan oleh Mahkamah Persekutuan akan mendatangkan manfaat kepada umum, merangka persoalan tersebut dalam cara tertentu dengan memasukkan poin undang-undang yang mana jawapannya memberi kesan untuk mengakas penghakiman Mahkamah Rayuan (lihat perenggan 6).

(2) Mahkamah Persekutuan telah diminta untuk menjawab isu yang tidak ditentukan oleh Mahkamah Tinggi dan juga Mahkamah Rayuan. Isunya adalah berkenaan dengan kesahan kontrak tersebut. Isu berkenaan dengan kesahan kontrak tersebut telah diabaikan oleh Mahkamah Tinggi pada peringkat hujahan dan tidak dinyatakan langsung di dalam memorandum rayuan perayu di Mahkamah Rayuan. Oleh itu, Mahkamah Persekutuan tidak boleh membuka dan menimbangkan semula isu tersebut. Persoalan yang dikemukakan tidak dirangka dengan betul di bawah s 96(a) Akta tersebut (lihat perenggan 11–12).]

Notes

For cases on appeal to Federal Court, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 749–756.

Cases referred to

Joceline Tan Poh Choo & Ors v V Muthusamy [2008] 6 MLJ 621, FC (refd)
Letchumi & Anor v The Asia Insurance Co Ltd [1972] 2 MLJ 105, FC (refd)
Lim Geak Liang v East West UMI Insurance Bhd [1997] 3 MLJ 517, FC (refd)
Minister for Human Resources, The v Thong Chin Yoong and another appeal [2001] 4 MLJ 225; [2001] 3 CLJ 933, FC (folld)

Legislation referred to

Courts of Judicature Act 1964 s 96(a)
Industrial Relations Act 1967 s 20(3)
Lembaga Pembangunan Industri Pembinaan Malaysia Act 1994
Rules of the Federal Court 1995 r 108(1)(c)

Appeal from: Civil Appeal No P-02–669 of 1999 (Court of Appeal, Putrajaya)

JA Yeoh (Shearn Delamore & Co) for the appellant.
Karin Lim (Lim Leng Han & SF Tho) for the respondent.

Nik Hashim FCJ (delivering judgment of the court):

[1] This appeal concerns the propriety of questions of law formulated pursuant to s 96(a) of the Courts of Judicature Act 1964 in a civil appeal to this court.

[2] On 19 March 2007, this court allowed the appellant's application for leave to appeal against the Court of Appeal's decision of 28 March 2006 based on the following questions:

(a) Whether the building contract entered into between Dataran Rentas ('the appellant') as the employer and the BMC Construction ('the respondent') as the contractor in pursuance of the letter of award dated 29 July 1997 is illegal under the provisions of the Lembaga Pembangunan Industri Pembinaan Malaysia Act 1994 ('LPIPM Act').

(b) Whether the respondent is entitled to present a winding up petition on the basis of the architect certificates or enforce payment of the architect certificates issued in respect of the building contract entered into between the appellant as the employer and the respondent as the contractor in pursuance of the letter of award dated 29 July 1997.

[3] The facts of the case are that by a letter of award dated 29 July 1997 the appellant awarded a building contract to the respondent. Pursuant to the letter of award, it was agreed that the terms and conditions of contract are as per the PAM Standard Form Contract 1969 Edition (Without Quantities)

(PAM Conditions) wherein cl 30(1) of the PAM Conditions read with the appendix, the appellant was contractually obliged to pay the respondents the amount due under the interim certificates within 30 days. The appellant failed to pay four interim certificates (certificates Nos 5–8) amounting to RM173,096.18 within the time stated under cl 30(1) of the PAM Conditions. As a result the respondents filed a winding up petition in the High Court against the appellant. The appellant was accordingly wound up that led to the appeal to the Court of Appeal which dismissed the appeal.

[4] At the conclusion of submissions of learned counsel from both sides on 4 November 2008, we declined to answer the questions posed as they do not come within the ambit of s 96(a) of the Courts of Judicature Act 1964 ('the Act'). In the result we did not consider the merits of the appeal and ordered that the appeal be dismissed with costs. The deposit be paid to the respondent towards its taxed costs.

[5] For ease of reference, it is perhaps necessary to be reminded of the requirements of s 96(a) of the Act which states as follows:

> Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court:
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> (a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage; or
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> (b) …

[6] To come within the ambit of s 96(a) of the Act, the applicant must, apart from satisfying this court that the judgment of the Court of Appeal is in respect of any civil matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage, frame the question in such a manner as to incorporate a point of law the answer to which has the effect of reversing the judgment of the Court of Appeal. In this regard Augustine Paul FCJ, in delivering the recent judgment of this court in *Joceline Tan Poh Choo & Ors v V Muthusamy* [2008] 6 MLJ 621, said at para 17, pp 632–633:

> This would depend … on the nature and manner in which the question for appeal is framed. It must be so couched as to incorporate a point of law which has the effect of reversing findings made against the intending appellant without any

further evaluation of the evidence. This in turn means that the answer given to the question must be such that it has the effect of reversing the judgment.

[7] Besides, the questions posed must relate to a matter in respect of which a determination has been made by the High Court and the Court of Appeal. However, a new point of law can be raised if all the facts necessary to support it have been raised in the Court of Appeal (see *Joceline Tan Poh Choo*; *Lim Geak Liang v East West UMI Insurance Bhd* [1997] 3 MLJ 517 (FC)).

[8] In *The Minister for Human Resources v Thong Chin Yoong and another appeal* [2001] 4 MLJ 225; [2001] 3 CLJ 933, this court (Wan Adnan Ismail CJ (Malaya), Siti Norma Yaakob FCJ and Haidar Mohd Noor FCJ) declined to answer the question framed for its determination. There the respondent was the Hotel & Resort Development Manager of Berjaya Industrial Bhd ('the company'). He was suspended from work by the company pending investigation of allegations of misconduct. The respondent being dissatisfied with the prolonged investigations considered himself constructively dismissed. The matter was eventually referred to the Minister for Human Resources ('the Minister') and the Minister, in the exercise of his discretion under s 20(3) of the Industrial Relations Act 1967, declined to refer the case to the Industrial Court for an award. The respondent then applied to the High Court for an order of certiorari and mandamus against the Minister's decision. The respondent was successful before the High Court as well as before the Court of Appeal. In this instance, the Minister and the company, appealed before the Federal Court.

In granting leave to appeal on 28 August 2000, this court pursuant to r 108(1)(c) of the Rules of the Federal Court 1995, framed the following question for its determination:

> Whether the employer can suspend an employee without loss of pay, benefits and perks pending the conclusion of the investigations and inquiries into his conduct notwithstanding that this is not stated in the terms of employment.

Haidar Mohd Noor FCJ (later CJ (Malaya)), in delivering the judgment of this court said at p 232 (MLJ); p 941 (CLJ):

> It seems to us that the Federal Court was asked to consider an issue which was not determined by the High Court as well as the Court of Appeal. To that extent the proper order that we should make would be to regrettably decline to answer the question. It is best that the issue of suspension be considered by the Industrial Court in determining whether the claimant was dismissed without just cause or excuse or as he put it 'constructively dismissed'.
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> In the circumstances of the case we agree with the preliminary objection of counsel for the claimant that the question framed by this court for its determination does not come within the ambit of s 96(a) of the Courts of Judicature Act 1964. In the

A result we need not consider the merits as submitted by counsel for the parties and it follows that both appeals must be dismissed with costs and we so order. In our view we can make such an order without considering the merits of the appeal (*Capital Insurance Bhd v Aishah bte Abdul Manap & Anor* [2000] 4 MLJ 65; [2000] 4 CLJ 1) …

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[9] Likewise in the present case, this court was asked to answer an issue which was not determined by the High Court as well as the Court of Appeal. The issue was on the legality of the contract. It is best that the issue of the legality be considered and decided by the High Court and the Court of C Appeal in determining whether the contract is illegal under the provisions of the LPIPM Act. Be it noted that the issue of legality of contract was abandoned in the High Court at submission stage and in fact not even stated in the appellant's memorandum of appeal at the Court of Appeal. The abandonment of the issue is clearly evidenced in both the High Court and the D Court of Appeal judgments. Therefore, this court cannot reopen and reconsider the issue. As Ong CJ (Malaya) observed in the Federal Court case of *Letchumi & Anor v The Asia Insurance Co Ltd* [1972] 2 MLJ 105 at p 106:

E An omission, at the trial, by inadvertence or otherwise, to canvass an arguable point is not the same thing as abandoning it altogether — which would have precluded us from reopening and reconsidering the matter.

[10] Such being the case, we held that the questions posed were not F properly framed under s 96(a) of the Act. Further, they do not relate to a matter in respect of which a determination has been made by the High Court and the Court of Appeal. Neither is there any evidence that the issue of legality of the contract was ever raised in the Court of Appeal. So, it would be a waste of judicial time and indeed not a proper exercise of authority of this court to engage itself in deciding such questions the answer to which G would not have the effect of reversing the judgment of the Court of Appeal. The court would not indulge in a fruitless exercise. Thus, this court has the power to decline to answer the questions posed despite the fact that leave to appeal had been granted. In the result, we declined to answer the questions and dismissed the appeal without considering its merits.

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Appeal dismissed.

Reported by Kanesh Sundrum

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